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Supreme Court, U.S.
FILED
JAN 2 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-558

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

In re: MANOA FINANCE COMPANY, INC.,
Debtor,

CHARLES R. KLENSKE, Trustee in reorganization,
Respondent,

vs.

GEORGE W.H. GOO; ROBERT S. TERAMOTO, *et al.*,

and

HIROTOSHI YAMAMOTO,
Petitioner.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT CHARLES R. KLENSKE, Trustee in reorganization

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January 2, 1987

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25pp

QUESTION PRESENTED FOR REVIEW

Whether petitioner is barred from challenging in this case the constitutionality of Act 187 of the Session Laws of Hawaii (1985 Regular Session).

PARTIES, NOMENCLATURE, AND ABBREVIATIONS

The parties to this matter are identified in the case caption. Messrs. Goo and Teramoto are not involved in the petition for a writ of certiorari.

This brief in opposition is filed on behalf of Charles R. Klenske, the duly appointed trustee in the underlying bankruptcy proceeding.

Throughout this brief, trustee Klenske will be referred to as "respondent." Act 187 of the Session Laws of Hawaii (1985 Regular Session) will be referred to as "Act 187." The debtor corporation, Manoa Finance Company, Inc., will be referred to as "MFC." Thrift Guaranty Corporation of Hawaii will be referred to as "TGC."

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CHARLES R. KLENSKE, Trustee in reorganization,
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GEORGE W.H. GOO; ROBERT S. TERAMOTO, *et al.*,

and

HIROTOSHI YAMAMOTO,
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT CHARLES R. KLENSKE, Trustee in reorganization

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OPINIONS BELOW

This case was decided by the Ninth Circuit in February 1986. The opinion is reported at 781 F.2d 1370. Petitioner seeks review of only the subsequent unreported order deny-

ing his petition for rehearing and suggestion for rehearing *en banc*. That order was entered on June 24, 1986 (Pet. App. C).

JURISDICTION

The Court has jurisdiction under 28 U.S.C. §1254(1). The petition was filed within the time required by 28 U.S.C. §2101(c).

The Ninth Circuit order denying the petition for rehearing was entered June 24, 1986 (Pet. App. C). The petition for a writ of certiorari was docketed in this Court on September 22, 1986.

STATEMENT OF THE CASE

Petitioner is the sole stockholder of Manoa Enterprises, Inc. which in turn owns all of the stock of MFC. In February 1983, MFC filed a voluntary petition for reorganization in the United States Bankruptcy Court for the District of Hawaii. Four months later, respondent was appointed trustee.

Act 187 was enacted effective June 3, 1985. In essence, it authorized the State of Hawaii to loan money to TGC[1] for the purpose of permitting prompt payment to depositors of MFC and of two other Hawaii financial institutions likewise involved in bankruptcy cases (Pet. App. H-1). Any loan so made would be "pursuant to a plan of reorganization or liquidation that has been confirmed by the court in the bankruptcy proceedings . . . ." (Pet. App. H-5), and any loan so made would be secured by the assets

[1]TGC is a non-profit corporation established as required under Hawaii Revised Statutes § 408A-4 by the industrial loan companies operating in Hawaii.

of TGC, including assets acquired from MFC (Pet. App. H-7).

Respondent's plan of reorganization was filed with the court in September 1985. The plan provided that MFC depositors would be paid the full amount of their claims; that MFC equity holders were not entitled to any distributions; and that any residual assets would be returned to TGC.[2]

Petitioner, then represented by counsel, objected to the plan. The primary target for objection was the provision concerning residual assets.[3] The objections were heard by the court, and, after hearing, respondent's plan of reorganization was confirmed by order entered October 2, 1985.

Petitioner, now proceeding *pro se,* noted an appeal from the order of confirmation of the reorganization plan. The notice of appeal invoked the fourteenth amendment against the treatment of MFC equity holders and against the return of assets to TGC (State of Hawaii App. B). The appeal was docketed in the Ninth Circuit in October 1985 as No. 85-2692. Two months later petitioner stipulated to dismissal of the appeal (State of Hawaii App. C). The Ninth Circuit order of entry of dismissal based on that sti-

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[2]Under the plan of reorganization, TGC waived its claim as assignee of depositor claims under the Advance Payment Program pursuant to which TGC advanced payments totaling approximately $12.6 million to MFC depositors.

[3]"Especially unfair under the reorganization plan is the provision that even after the payment of all claims, any surplus remaining out of the $27.5 million paid to Manoa Finance Company by Thrift Guaranty Company will be returned to Thrift Guaranty Company. . . . If any surplus remains after all the claims have been paid, it should go to the stockholders and not Thrift Guaranty Company. . . ." (Resp. Exh. D at 7-8).

pulation and Fed. R. App. P. 42 was filed December 17, 1985 (State of Hawaii App. D). The Ninth Circuit order summarily affirming confirmation of the plan of the reorganization was filed December 30, 1985 (State of Hawaii App. E).[4]

The present petition for a writ of certiorari does not arise from the appeal to the Ninth Circuit of the plan of reorganization. It arises from a related but distinct Ninth Circuit case. Specifically, it arises from an adversary proceeding against petitioner resulting from his personal indebtedness on promissory notes executed by him in favor of MFC. Petitioner, then represented by counsel, opposed the motion for partial summary judgment. The district court granted the motion after hearing.

Petitioner appealed *pro se*. The notice of appeal is Appendix A to this brief. The Ninth Circuit opinion reported at 781 F.2d 1370 disposed of all issues raised by petitioner on appeal. Petitioner then filed a combined petition for rehearing and suggestion for rehearing *en banc*, accusing the district court of partiality and asserting the unconstitutionality of the plan of reorganization (State of Hawaii App. B). The Ninth Circuit denied rehearing without requesting an answer from respondent.

SUMMARY OF ARGUMENT

The petition for a writ of certiorari should be denied because the issues for which certiorari is sought — relating to Act 187 — are not properly before the Court. They are not part of this proceeding and, in fact, were affirmatively abandoned by petitioner in the related case.

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[4]The order does not appear on the Ninth Circuit docket (Resp. Exh. C).

ARGUMENT

Petitioner has been involved in two separate cases arising out of the MFC bankruptcy reorganization. The first is the overall matter of the confirmation of the plan of reorganization (Ninth Cir. Dkt. No. 85-2692). It included petitioner's constitutional challenges to the plan of reorganization and, necessarily, to Act 187 on which the plan was grounded. The reorganization plan case terminated by stipulated dismissal in December 1985.

The second case is the matter of petitioner's indebtedness to MFC on the promissory notes (Ninth Cir. Dkt. No. 84-2807). It is this simple promissory note case which is now before the Court.

With this bifurcated background, it is clear that the petition for a writ of certiorari should be denied for the following reasons:

1. Petitioner is attempting to resurrect by means of a petition for a writ of certiorari in the promissory note case the same constitutional attack on the reorganization plan which he previously raised and then voluntarily dismissed in the reorganization plan case. The questions presented by petitioner in support of the petition for certiorari appear to be a restatement of the precise questions cited in the notice of appeal from the order confirming the plan of reorganization (State of Hawaii App. B). The Ninth Circuit summarily affirmed the confirmation of the plan and, thereafter, petitioner neither requested rehearing by the Ninth Circuit nor petitioned for a writ of certiorari to this Court (Resp. Exh. C).

2. Respondent was empowered to attempt collection on the promissory notes executed by petitioner without regard to Act 187 or any other statutory enactment of the State of Hawaii. In 1983, respondent's authority to collect

BEST AVA

on the promissory notes was derived from 11 U.S.C. §323,[5] 11 U.S.C. §541,[6] and Bankruptcy Rule 6009.[7] Specifically, the property accruing to the estate under section 541(a)(1) included all rights of action of the debtor arising out of a promissory note or contract. 4 *Collier on Bankruptcy*, ¶541.10[5] (15th ed. 1986).

3. Petitioner contends that Act 187 is "new evidence" which justifies issuing the writ (Pet. at Question Presented and p. 4). This contention is both irrelevant and erroneous. It is irrelevant to this case, the promissory note case, because respondent's authority to undertake collection on

---

[5]At all times relevant to this case, 11 U.S.C. § 323 provided:

> Role and capacity of trustee.
>
> (a) The trustee in a case under this title is the representative of the estate.
>
> (b) The trustee in a case under this title has capacity to sue and be sued.

[6]At all times relevant to this case, 11 U.S.C. § 541 defined the property of the estate, in pertinent part, as follows:

> Property of the estate.
>
> (a) The commencement of a case under section 301, 302 or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:
>
> (1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case. . . .

[7]Bankruptcy Rule 6009 provided:

> Prosecution and Defense of Proceedings by Trustee or Debtor in Possession.
>
> With or without court approval, the trustee or debtor in possession may prosecute or may enter an appearance and defend any pending action or proceeding by or against the debtor, or commence and prosecute any action or proceeding in behalf of the estate before any tribunal.

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the notes predated Act 187 and was not enlarged or even affected by it. It is erroneous because, even in the context of the reorganization plan case, Act 187 predated the plan; predated petitioner's objection to the plan; predated the notice of appeal from confirmation of the plan; and predated the stipulation of dismissal of the appeal.[8]

In short, petitioner is attempting to exhume the corpse of the reorganization plan case for viewing in the promissory note case. For this reason, the Court need not address the merits of the petition and need not adjudge the petition against the Rule 17 considerations governing review on certiorari.[9]

[8]It is further erroneous because, even if Act 187 were somehow relevant to the promissory note case – which it is not – it was not "new evidence" which could have been raised for the first time – as petitioner did – only on the petition for rehearing. It could earlier have been brought to the Ninth Circuit's attention pursuant to Fed. R. App. P. 28(j).

[9]As to these matters, respondent adopts and relies upon the brief of the State of Hawaii in opposition to the petition for certiorari.

CONCLUSION

If the issues which petitioner is attempting to raise by means of the petition for a writ of certiorari are relevant to anything, they are relevant only to the related case which was dismissed over a year ago by the Ninth Circuit without further action by petitioner. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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808-523-2500

Counsel for Charles R. Klenske,
Trustee in reorganization

January 2, 1987

APPENDIX

HIROTOSHI YAMAMOTO, pro se
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85-175 Farrington, Hiway
Waianae, Hi 96792

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF HAWAII

In Re 84-2807

MANOA FINANCE COMPANY, INC. a Hawaii corporation,	BK. NO. 83-00065
Debtor	ADV. PROCEEDING NO. 83-0222
CHARLES R. KLENSKE, Trustee in Reorganization,	NOTICE OF APPEAL FROM ORDER GRANTING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT
Plaintiff	
vs.	Certificate of Service
HIROTOSHI YAMAMOTO, et al	
Defendants.	

NOTICE OF APPEAL FROM ORDER GRANTING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

I, HIROTOSHI YAMAMOTO, hereby give Notice of Appeal to the UNITED STATES COURT OF APPEALS for the NINTH CIRCUIT, from the Order Granting Plaintiff's Motion for Partial Summary Judgment, dated November 13, 1984, and signed by the Honorable Samuel P. King, District Court Judge.

My appeal is based on the following:

1. The "form" of the transactions cited belie their true "substance." The transactions were not de facto loans, but were *advances* made for the sheer survival of Manoa Finance Company under the pressure of the arbitrary, and discriminatory 10 to 1 debt to capital ratio required by the State, for industrial loan companies *only*.

2. The patent existence of a conflict of interest of the presiding District Court Judge in the Adversary Proceeding, who is also the Administrative Judge in the bankruptcy proceedings, denying defendant the assurance of a fair and impartial trial.

3. The patent breach of fiduciary trust of plaintiff, who had obtained judgment with a "lack of clean hands."

DATED: Honolulu, Hawaii, December 11, 1984.

/s/ Hirotoshi Yamamoto
HIROTOSHI YAMAMOTO, pro se

FILED
UNITED STAES BANKRUPTCY COURT
DISTRICT OF HAWAII
DEC 11 1984
at 3 o'clock and 10 min. p.m.
DOROTHY K. IPPONGI, CLERK

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

(N/S 3/420 Trustee). CIVIL. DISTRICT OF HAWAII

In re: MANOA FINANCE COMPANY, INC., a Hawaii corp.
Debtor.

CHARLES E. [sic] KLENSKE, Trustee in reorganization,
Plaintiff-Appellee,

v.

GEORGE W. H. GOO; ROBERT S. TERAMOTO, et al.,
Defendants,

and

HIROTOSHI YAMAMOTO,
Defendant-Appellant.

Prev. Rel to: 83-2361 & 83-2371 (42(b, [sic] FRAP
Rel to: 84-2337 & 85-2692

For Appellee: Nadine Ando, Esq.
Ivan Lui-Kwan, Esq.
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Los Angeles, CA 90067 (213) 553-3939

For Appellant:
Hirotoshi Yamamoto (Pro Per)
c/o Makaha Surfside, Apt. B/426,
85-175 Farrington Hi-way
Waianae, HI 96792

(SEE CLK'S CARD FOR ADD'L COUNSEL)

DATE	FILINGS-PROCEEDINGS	CLERK'S FEES	
		APPELLANT	APPEL
1984			
Dec. 31	DOCKETED CAUSE AS OF 12/14 AND ENTERED APPEARANCES OF APPELLANT IN PRO PER; COUNSEL FOR APPELLEE. ogm	$65	
1985			
Feb. 4	FILED AS JANUARY 21, 1985 CERTIFICATE OF RECORD (1/16/85) mb		
Feb. 4	APPELLANT'S OPENING BRIEF IS DUE MARCH 18, 1985. mb		
MAR. 20	Filed Orig & 15 Aplts opening brief w/5 Excerpts of record. (27p) 3/18 -vt-		
Mar. 29	Filed as of 3/28, Appellee's Ex-parte motion for first ext of time to file answering brief to & including May 15, 1985. (CIVATT) 3/27 ogm		
April 9	Filed order (SNEED) aple's mot. for an ext. of time until May 15, 1985, to file his answering brief is granted. Absent extraordinary circumstances, no further extension of time will be granted. tsp (4/9)		
MAY 17	Filed Orig & 15 Aple briefs w/5t Suppl Excerpts of record. (42p) 5/15 -vt-		
MAY 22	FILED AS OF 1/21 CERT. TRANSC. OF RECORD ON APPEAL IN TWO VOLUMES: VOL. I. PLDGS, VOL. II, ORIG R/T'S. -vt-		
June 3	Filed Orig & 15 Aplt's reply briefs (7 pgs). 5/28 ogm		
Oct. 28	Recvd Ltr dtd 10/23 from aple's counsel (Fujiyama, Duffy & Fujiyama) re: will not appear at oral argument. (Panel) tsp		
Nov. 05	Filed Appellant's Pre-Trial Statement (Yamamoto). (Panel) dmd		

NOV. 12 Filed Aple (manoa [sic] Finance Co.,) Emergency motion for consolidation of pending appeals & motion for summary affirmance, etc., with points & authorities in support. (panel) -vt-

NOV 12 Filed order (SKOPIL, FLETCHER & ALARCON) Aple's emergency motion for consolidation of this appeal with No. 85-2807 is denied. -vt-

Nov. 13 Filed as of 11/13 aplt's opposition to aple's emergency mot. for consolidation of pending appeals and mot. for summary affirmation of order confirming Chapter 11 Plan of reorganization. (11/12) (Panel) tsp

Nov. 19 ARGUED & SUBMITTED TO: SKOPIL, FLETCHER, ALARCON, CJJ. gb

1986

FEB 04 ORDERED OPINION (PER CURIAM) FILED & JUDG. TO BE FILED & ENTD.

FEB 04 FILED OPINION – AFFIRMED.

FEB 04 FILED AND ENTERED JUDGMENT. -ot-

Feb. 20 Filed aplt's petition for rehearing & suggestion for rehearing en banc. 02/14 (Panel & Active Judges) -ot-

Feb. 21 Filed aple's bill of cost. 02/18 -ot-

June 24 Filed Order (SKOPIL, FLETCHER & ALARCON, CJJ) the petition for rehearing is denied and the suggestion for rehearing en banc is rejected. tsp

JUL. 08 1986 MANDATE ISSUED COSTS TAXED

Jul. 10 Filed as of 07/07, aplt's notice to appeal to the SC. 07/01 -ot- (CIVATT) 07/30 -ot-

Jul. 14 Filed as of 07/10, aple's request for atty fees. 07/08 -ot- (CIVATT) 07/30 -ot-

Jul. 21 Filed aple's supplemental application for attys fees. 07/18 -ot- (CIVATT) 07/30 -ot-

Oct. 3 Filed Order (SKOPIL, FLETCHER & ALARCON, CJJ) pltf-aple's request for atty's fees is denied. tsp

Oct. 20 Rec'd SC notice of filing petition for certiorari on 09/20/86. #86-0558 -ot-

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

(N/S 3/420 Trustee). CIVIL. D.C.: HAWAII

In re: MANOA FINANCE COMPANY, INC., a Hawaii corp.
Debtor.

CHARLES E. [sic] KLENSKE, Trustee in reorganization,
Plaintiff-Appellee,

vs.

GEORGE WH. [sic] H. GOO; ROBERT S. TERAMOTO, et al.,
Defendants,

and

HIROTOSHI YAMAMOTO,
Defendant-Appellant.

Rel to: 84-2807

For Appellee:

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Honolulu, Hawaii 96792

SEE CLERK'S CARD FOR ADDITIONAL COUNSEL

DATE	FILINGS-PROCEEDINGS	CLERK'S FEES	
		APPELLANT	APPEL

1985

OCT. 21 DOCKET NUMBER ASSIGNED. cmk $65

OCT. 22 DOCKETED CAUSE & ENTERED APPEARANCES OF COUNSEL. cmk

OCT. 22 SENT APPELLANT CIVIL APPEALS DOCKETING STATEMENT. cmk

Oct. 31 FILED APLT'S C.A.D.S. (10/29) (CONFATT) dmd

NOV. 12 Filed in 84-2807 Aple (Manoa Finance Co.,) emergency motion for consolidation of pending appeals & motion for summary affirmance, etc., with points & authorities in support. -vt- (CIVATT FOR ADD'L RELIEF)

NOV. 12 Filed in 84-2807 order (SKOPIL, FLETCHER & ALARCON) Aple's emergency motion for consolidation of this appeal with No. 85-2807 is denied. -vt-

Nov. 14 Filed CERTIFICATE OF RECORD (11/5) dmd

Nov. 21 Recvd ltr dtd 11/18 from aple re: caption onf 11/12 court had the wrong case caption. (CIVATT) tsp

Dec. 9 Filed aple's emergency mot. to dismiss appeal of affirm. (12/6) (CIVATT) tsp

Dec. 13 Filed Stipulation of Dismissal

DEC 17 1985 Filed entry of dismissal per 10(b) WMP

Case Closed 1/10/86

/s/ Dave Domg, Deputy Clerk
for Clerk, U.S. Court of Appeals

APPENDIX D

IN THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF HAWAII

In Re	) BK. NO. 83-00065
	)
MANOA FINANCE COMPANY, INC., A Hawaii corporation,	) MEMORANDUM) IN SUPPORT OF) OBJECTIONS TO
Debtor.	) TRUSTEE'S PLAN OF) REORGANIZATION
	)
CHARLES R. KLENSKE, Trustee in Reorganization for MANOA FINANCE COMPANY, INC.,	)
Plaintiff,	)
vs.	)
HIROTOSHI YAMAMOTO, GEORGE W.H. GOO, ROBERT S. TERAMOTO, MASAYUKI TOKIOKA, SHIZUKO YAMAMOTO, SAKAE TAKAHASHI, ELIZABETH TAKAHASHI, MAKAHA LAUNDRY,INC., MAKAHA REEF, INC., TAKAHASHI-YAMAMOTO JOINT VENTURES, SSK INVESTMENTS, INC. and ASIAN AMERICAN MEDICAL CLINIC OF SAN FRANCISCO,	)
Defendants.	)

MEMORANDUM IN SUPPORT OF OBJECTIONS TO TRUSTEE'S PLAN OF REORGANIZATION

Comes now HIROTOSHI YAMAMOTO, by and through his attorneys, UKISHIMA & MATSUBARA, and respect-

fully submits the following Memorandum in support of his objections to the Trustee's Reorganization Plan.

* * *

2. The Reorganization Plan Unfairly And Inequitably Enriches Thrift Guaranty Company To The Detriment Of Stockholders

Even should this Court not take the assessed value as assigned by the Trustee, it is clear that the assets of Manoa Finance Company are worth far more than the proposed sale price of $27.5 million. This Court should not approve the sale of assets to Thrift Guaranty Company for only $27.5 million. Selling the assets of Manoa Finance Company to Thrift Guaranty Company for that amount would result in a windfall for Thrift Guaranty Company. Thrift Guaranty Company is already under an obligation to pay off the depositors of Manoa Finance Company regardless of whether Manoa Finance Company has any assets or not. The sale to Thrift Guaranty Company would be awarding Thrift Guaranty Company for something it already is obligated to do. If anything is sold to Thrift Guaranty Company, the assets sold to them should only be enough to pay Thrift Guaranty Company for any monies that it has advanced to Manoa Finance Company.

Especially unfair under the reorganization plan is the provision that even after the payment of all claims, any surplus remaining out of the $27.5 million paid to Manoa Finance Company by Thrift Guaranty Company will be returned to Thrift Guaranty Company. Manoa Finance Company would, under the plan, sell $27.5 million of assets to Thrift Guaranty Company for $27.5 million in cash. It is patently absurd, unfair and inequitable to return any surplus remaining from the $27.5 million to Thrift Guaranty Company after the claims have been paid off,

because Thrift Guaranty Company would have already received more than full value for its money. If any surplus remains after all the claims have been paid, it should go to the stockholders and not Thrift Guaranty Company. (Trustee's Memorandum of Points and Authorities in Support of Motion for Order Authorizing Filing of Plan Combined with Disclosure Thereon, filed August 19, 1985, pages 5-6).

3. The Reorganization Plan Incorrectly Determines The Value Of Manoa Finance Company's Assets

Finally, the Trustee has magically assessed and discounted the price for all the assets of Manoa Finance Company to $27.5 million, the exact price Thrift Guaranty Company is willing to pay for the assets of Manoa Finance Company, and also exactly what is needed to pay off all creditors of Manoa Finance Company, aside from inside creditors and stockholders. The Trustee gives no information as to how he has arrived at the price. He states that some properties may not be valuable and some of the receivables may not be collectible until a later date. He gives no formula or breakdown to show how he devalued * * *